IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOODHOPE PROVINCIAL DIVISION)

"REPORTABLE"

CASE NO. 4686/2005

In the matter between:

SANDCORP 94 CC **APPLICANT**

And

PETER ROBERT ADENDORFF
RESPONDENT
INTERVENING
CREDITOR: ELMARIE ADENDORFF

JUDGMENT DELIVERED ON 01 FEBRUARY 2006

<u>DLODLO, J</u>

INTRODUCTION

1) This is an application for the sequestration of the Respondent's estate. The provisional sequestration order was granted on 1 June 2005, returnable on 25 July 2005. On the return date, however, the application was opposed by an intervening creditor, one Elmarie Adendorff. The latter is the Respondent's ex-wife. Mr. Ulyate appeared for the Applicant whilst Ms Maas appeared for the intervening creditor.

BACKGROUND

2) The Applicant is Sandcorp cc; a Close Corporation duly registered in terms of the laws of the Republic of South

Africa, trading as Steers, Melkbosstrand. One Anneke Adendorff ("the Respondent's present wife") is the sole member of the Applicant. The Respondent is Peter Robert Adendorff and is married to Anneke Adendorff. Peter Adendorff is the Manager of the Applicant. The intervening creditor is the Respondent's ex-wife by virtue of a divorce order granted on 8 November 2002.

3) The Respondent owes the intervening creditor an unsecured sum of one hundred and one thousand seven hundred and fifty rands (R101 750.00), an amount which came about as a result of maintenance arrears in respect of which the intervening creditor is apparently currently armed with a civil Judgment by the Magistrate's Court.

4) Chronologically it would appear from the papers the events unfolded themselves as follows:

5) In terms of the settlement agreement when the Respondent and the intervening creditor divorced, the Respondent became liable to the intervening creditor for the maintenance and half of the proceeds realized upon the sale of the business. The business was sold for an amount of One Hundred and Seventy Five Thousand Rands (R175 000.00).

6) It is not disputed that the Applicant lent and advanced an amount of R1 800.00 to the Respondent who at the time was managing the Applicant earning an amount of R5 000.00 monthly by way of salary. It is also the true position that an amount totalling R36 500.00 was paid to the Respondent by the Applicant in January and March 2005 respectively.

7) It is apparent from the papers that the Respondent's present wife (sole member of Applicant) was instrumental in enabling and authorizing the Applicant to financially assist the Respondent by paying certain of the Respondent's monthly living expenses amounting to an amount of R11 700.00.

APPLICABLE LAW

(8) On the return day of the provisional order, the Court has a discretion to sequestrate the Respondent's estate provided it is satisfied as to the three (3) elements of the Applicant's case, namely:

a) that the applicant 'has established against the Respondent a claim' upon the basis of which one is able competently to seek sequestration;

b) that the Respondent have committed an act of insolvency or is insolvent; and

c) that there is reason to believe it will be to the advantage of creditors of the Respondent if his estate is sequestrated.

(9) The facts relied on by the applicant in respect of each of the three elements of its case must be proved at this level, on a balance of probabilities, the onus being on the Applicant. (See ***Sacks Morris (Pty) Ltd v Nair*** 1957(3) SA 591 (N) at 593; ***BP Southern Africa (Pty) Ltd v Furstenburg*** 1966(1) SA 717 (O) at 720; ***Mackay v Cahi*** 1962(4) SA 193 (O) at 194; ***Meyer and Kie v Maree*** 1967(3) SA 27 (T) at 30)

10) The Insolvency Act 24 of 1936 as amended substantially contains the law relating to Insolvency. It is needless to set out in this Judgment the provisions of sections 8 and 9 of

the above-named Act. The contents of these sections have become trite law.

APPLICATION OF LAW TO FACTS OF INSTANT MATTER

11) In the instant matter it is important to note that the intervening creditor is the Respondent's ex-wife and that the sole member of the Applicant cc is the current/present wife to the Respondent. Reference will be made to this aspect later on in this judgment. According to the Respondent's present wife, the sole member of the applicant cc, the Respondent earns a monthly salary of R5 000.00 and the Respondent has been working at the Applicant's business since December 2004. According to Annexures **"EA3", "EA4"** and **"EA5"** to the Intervening Creditor's Opposing papers, the following amounts were paid by Applicant to the Respondent's bank account:

a) On 12 December 2004 R10 000.00

b) On 24 January 2005 R10 000.00

c) On 7 march 2005 R26 500.00.

(12) Aforesaid payments have not been disputed either by the Applicant or the Respondent. On the contrary, the Respondent's present wife in the Replying Affidavit alleged that the amounts represent outstanding salaries owing to the Respondent by the applicant. It is specifically stated in reply that these amounts do not constitute loans. Simple arithmetic calculation, however, betrays the assertion that these are outstanding salary payments. If the Respondent worked for the Applicant as from December 2004 and his earning being the alleged R5 000.00 per month, then the outstanding salary payments would have been the sum of R20 000.00 (4 months x R5 000.00 per month). Instead of R20 000.00, however, the Respondent got paid R46 500.00. There is most certainly, a lot

of hidden information in this regard.

(13) In passing, I need to mention that I am concerned about the following contents of paragraph 15 of the Founding Affidavit, namely:

"During November 2004 the Respondent sold part of his business conducted under the name and style of Skye Marketing for the amount of R175 000.00, which amount was used to pay his creditors and living expenses for a few months thereafter. At the same time he entered into an agreement with his two brothers who were unemployed and financially destitute at the time, in terms whereof they would conduct the remaining part of the business (Skye Marketing), being a fresh line foods business, until such time as the business was earning a net profit in excess of R3 000.00 per month, whereupon he would be entitled to receive one third of the nett profit of the business. To-date the business has not made such income and the Respondent receives no income from this source,…"

(14) Strangely by way of an affidavit dated 13 October 2005 the Respondent confirmed the information provided to one Gerhardus Marthinus Jacobus Nel. According to Mr. Nel (who is a business and property broker and who made a determination of the value of Skye Marketing) the average net profit of Skye Marketing, from December 2004 to July 2005, exceeded the amount of R3 000.00. This, contrasted with the content of paragraph 15 set out *supra*, means that the Respondent should have received one third (1/3) of the nett profit of Skye Marketing, an income which is not mentioned. Once again, there appears to exist information which is vital

but which is hidden away.

(15) Section 8(g) of the Insolvency Act provides thus:

"A debtor commits an act of insolvency if he gives notice in writing to any of his creditors that he is unable to pay any of his debts."

In my view a debt envisaged in the above quoted section must be a real debt in the true sense of the word "debt". It must also be due and payable. One must be careful whenever one is confronted with Section 8(g) of the Insolvency Act. I am in full agreement with **Meskin** in his work **Insolvency Law** on page 2-16 where he states the following:

> **"The giving of a notice of inability to pay debts is frequently the means used for the purpose of obtaining what is designated as a "friendly sequestration" ie, the notice is deliberately given in order to furnish the "friendly" creditor with an act of insolvency for the purpose of sequestration proceedings to be brought by the latter. Such notice is indeed an act of insolvency, provided that the application for sequestration does not constitute an abuse of the process of Court."**

(16) In the instant matter the Respondent who had been served with a writ of execution consequent to a judgment for arrear maintenance plus an amount representing 50% of the proceeds of the sale of part of his business consulted an attorney. During this consultation the sole member of the Applicant in her capacity as the Respondent's wife was apparently present. According to the latter the Respondent was advised in her presence that he was insolvent and that he should be sequestrated. The Respondent's wife subsequently

on 16 May 2005 sent a letter on behalf of the Applicant of which she is the sole member, to the Respondent demanding payment of the sum of R1 800.00. As could be expected the Respondent responded in writing and stated the following:

> **"As you know I have a number of debts and I am unfortunately unable to repay the said loan at this stage, nor will I be able to do so in the foreseeable future."**

(17) Consequent to the receipt of the above response, which is clearly in line with the provisions of Section 8(g) of the Insolvency Act, the Applicant deposed to the Founding Affidavit for the sequestration proceedings. I have set out in this judgment payments (huge ones) made by the applicant to the Respondent. These payments were made at the time and moment when it was well within the knowledge of the Applicant that the Respondent owes it an amount of R1 800.00. If this was a genuine, true and real debt which was due and payable, what would have prevented the Applicant from informing the Respondent that such an amount will be deducted from whatever payments were due to the Respondent by the Applicant? Why would the Applicant not proceed to deduct that "debt" from any of these huge payments it made to the Respondent? In my view the debt of R1 800.00 claimed by the Applicant is not real and true debt solely in the light of various huge payments made by the applicant to the Respondent after the "debt" was allegedly incurred. The inability to pay, evidenced by the Notice, must be an actual inability to pay, irrespective of the reason thereof. This Court must carefully consider the evidential material presented in support of the application, particularly at this stage of the proceedings.

(18) Courts ordinarily have statutory discretion to grant sequestration orders. Courts also have inherent jurisdiction to ensure and prevent any possible abuse of its process.

Meskin: Insolvency Law page 2-23 makes the following important formulation:

"The consideration that the application is a "friendly" one entails the careful scrutiny thereof by the Court in order to protect the interests of creditors. Such scrutiny should be directed, inter alia, to the sufficiency of the evidence of the claim upon which the applicant relies. Even where a provisional order of sequestration has been granted, the Court may still refuse the granting of a final order where it appears that there is an abuse of the process." (See, eg, ***Craggs v Dedekind*** 1996(1) SA 935 (C) and see ***Beinash*** case *supra* in note 4A; and ***Dunlop Tyres*** case and ***Streicher*** case *supra* in note 8; and ***Van Rooyen v Van Rooyen (Automutual Investments (EC) (Pty) Ltd, Intervening Creditor*** (2000) 2 All SA 485 (SE). ***Mthimkhulu v Rampersad & Others*** (2000) 2 All SA 512 (N) prescribed a rule of practice (which operates in the Natal Provincial Division of the High Court) according to which seven minimum evidential requirements must be met before a "friendly sequestration" application will be entertained by the Court.) It cannot be doubted that the present sequestration application is indeed a "friendly" one. It is brought by the Applicant solely owned by the Respondent's wife; the latter certainly has an interest in the affairs of the Respondent. That is the reason why she together with the Respondent consulted an attorney. Courts of law will always ensure that their inherent jurisdiction is used to prevent and exclude the possibility of abuse of its process.

(19) Sequestration applications are made for the benefit of the

general body of creditors and not for the convenience of the married couple. Sequestration applications must always be well grounded and they must be *bona fide* brought. If there is clear evidence that such proceedings are being brought *mala fide*, same must not be allowed to succeed and the party responsible for the *mala fide* application must be punished appropriately by way of costs order. It remains our law that even if the creditor is able to establish all the elements of the case for sequestration, the Court will still have a discretion on whether or not to grant the sequestration order, be it provisional or final. (See: ***Sections 10 and 12 of the Insolvency Act***, Act 24 of 1936; ***Meskin Insolvency Law*** page 2-5 para 2.1.1). It is trite law that a Court entrusted with a discretion must always exercise same judiciously.

(20) ***Brinkman v Botha & Others*** 2004 JOL 13093 (C) is a case with almost similar facts as the instant case. In Brinkman case the following remarks by the Court are relevant to the instant matter, namely:

"[33]The undisputed facts of this case lend themselves to precisely such an inference. The application for the sequestration of the first respondent is shrouded in collusion. The friendship between applicant and the first respondent, the former's knowledge of the Rule 66(1) litigation by the intervening creditor against the first respondent, the flimsy information about the act of insolvency relied upon, the unsatisfactory and undetailed information pertaining to the first respondent's debts."

Similarly in ***Esterhuizen v Swanepoel and 16 others*** case 2004(4) SA 89 (W) at 94A the following remarks are also apposite:

'(k) The borrower is so horrified at his own abject

> ***financial situation, that he/she immediately writes a letter advising of an inability to repay the loan. There is stated a bare inability to pay – no requests for extensions of time, no proposals to pay in instalments, no offer to render services or even suggestions that the lender initiate another cause of action.'***

(21) Indeed the undisputed facts and circumstances in the instant matter lend themselves to an inescapable inference of collusion between the Applicant (a cc solely owned by the Respondent's wife) and the Respondent. I cannot lose sight of the very obvious manoeuvre on the part of this married couple intended most certainly to cushion their own matrimonial relationship. At the risk of being repetitive I set out infra the reasons why I have found the existence of collusion in the instant matter:

i) The Respondent is married to the sole member of the Applicant and the latter is instrumental in the bringing of this application.

ii) The Respondent is employed by the Applicant in a very important capacity.

iii) After the alleged loan of R1 800.00 by the Applicant to the Respondent, the former "overpaid" the latter certain huge monthly payments and claimed that those amounts did not constitute loans.

iv) There is no evidence that the Applicant and the Respondent (despite their relationship at work and domestically) negotiated any repayment of the alleged debt of R1 800.00. The Applicant in a Section 8(g) letter to the Respondent hardly alludes to the possible extension of time within which to honour this "debt". Application to sequestrate the Respondent is both drastic and uncalled for, especially brought by a party which monthly pays the Respondent.

(22) The Respondent's present wife (sole member of the Applicant) is not disqualified in law from bringing applications of this nature against the Respondent because their marriage is in any event out of community of property. But it remains of paramount importance that the application must be for the benefit of the general body of creditors. It has not been successfully shown that this application will benefit creditors.

(23) In ***Craggs v Dedekind, Baartman v Baartman and Another, Van Jaarsveld v Roebuck, Van Aardt v Borrett*** 1996(1) SA 935(C) Conradie J (as he then was) stated on 937: ***"Friendly sequestrations seem to share certain characteristics. Although, like pornography, they may be hard to define, they are easy to recognise. The debt which the sequestration creditor relies upon is almost always a loan. It is usually quite a small loan, very often made in circumstance where it would have been apparent to the whole world that the respondent was in serious financial difficulty. Despite this, the loan is customarily made without security of any sort. It is seldom evidenced by a written agreement, or even subsequently recorded in writing. The only writing that is produced to the court is the letter stating, with appropriate expressions of dismay that the debt cannot be paid, and, sometimes, for good measure, setting out details of the respondent's assets of liabilities. Very often debtor and creditor are related: fathers commonly sequestrate sons, wives sequestrate husbands and sweethearts sequestrate each other, without, I am sure, any damaging effect on their***

relationship. Co-operation between debtor and creditor, which is fine, can easily turn into collusion, which is not. A Court should, I consider, be on its guard against it. Because of this, and when the signs are there, a Court may be forgiven for requiring rather more from a friendly petitioner in the way of establishing his claim than it might otherwise do. He should, I believe, present sufficiently detailed evidence to satisfy a sceptical Court that he indeed has a claim against the respondent."

I fully agree with the above sentiments. They apply with full force in the instant matter.

COSTS

(24) The general rule remains that the successful party is entitled to its costs. In the instant matter there is no justification for introducing an exception to this rule.

ORDER

(25) In the circumstances I make the following order:

a) The application is dismissed and the Rule Nisi granted on 1 June 2005 is discharged.
b) The Applicant is to pay costs of the Intervening Creditor.

DLODLO, J